

Memor: for Da: Bruce 8th
August 4, 1737. Aug. 1757

MEMORIAL

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3rd July 1760. *Indulgent*

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DAVID BRUCE, Writer in *Edinburgh*.

JOHAN MACARTHUR, Writer in *Edinburgh*, Executor nominate by the deceased *Ludovick Grant*, Writer there, and Mrs. *Elizabeth Leslie*, late House-keeper to the Lady *Aberdeen*, Creditor to the said deceased *Ludovick Grant*, by Bond, dated the 7th of May 1754, for the principal Sum of 50 *l. Sterling*, with Annualrent and Penalty, having brought an Action before the Court of Session, against Mrs. *Barbara* and Mrs. *Grizel Grants*, Sisters-german to the said deceased *Ludovick Grant*, concluding against them as vicious Intromitters with their said Brother's Effects, either to restore those Effects in the Condition they were in when taken away, or otherways to make Payment to the said *John Macarthur*, of the Sum of 100 *l. Sterling*, and to the other Pursuer, Mrs. *Elizabeth Leslie*, of the said Sum of 50 *l. Sterling*, with Annualrent and Penalty, they upon the 13th Day of *February*, and 9th of *July* 1755, obtained Decreet, decerning the said Mrs. *Barbara Grant*, to return certain Goods to the said *John Macarthur*, and also decerning her to make Payment to the Pursuers, of the Sum of 22 *l. 2s. Sterling*, which belonged to her deceased Brother, and was intromitted with by her; and in like Manner, decerning the said Mrs. *Grizel Grant*, as vicious Intromitter with her Brother's Effects, to restore those Effects in as good Condition as they were when taken away, or otherways, to make Payment to the said *John Macarthur*, of the said Sum of 100 *l. Sterling*, and to the other Pursuer of 50 *l. Sterling*, with Annualrent and Penalty: Which Decreet

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creet was entirely in absence, with regard to Mrs. *Grizel Grant*, one of the Defenders; and though there was Appearance made for the other Defender, Mrs. *Barbara Grant*, yet the Decreet was pronounced without any Acknowledgment or Evidence, in so far as concerns the 22^l. 2^s. decerned for.

During the Dependence of this Process, the Pursuers having used Arrestments in the Hands of *Robert Grant*, Merchant in *Leith*, and others, arresting the Sum of 300^l. *Sterl*. less or more, due and addabted by them, to the saids Mrs. *Barbara* and *Grizel Grants*, " Together with all Goods, " Gear, and every other Thing then in their Custody and " Keeping, pertaining to the saids Mrs. *Barbara* and *Grizel Grants*, all to remain under sure Fence and Arrestment, " aye and while sufficient Caution were found, that the same " should be made furthcoming to the Pursuers." *David Bruce*, Writer in *Edinburgh*, became Cautioner upon the 15th Day of *October* 1754, " For the saids Mrs. *Barbara* and *Grizel Grants*, that the Goods and Effects pertaining to them, " arrested in the Hands of the said *Robert Grant*, should be " made furthcoming to the said Pursuers, in case at discussing " the Process raised at their Instance, against the saids *Barbara* and *Grizel Grants*, it should be found, that they ought " to restore the Goods and Effects, or make Payment of the " Sums of Money libelled, whereupon the Arrestment in the " said *Robert Grant's* Hands was loosed."

Thereafter the said Pursuers having thought fit to bring an Action against the Memorialist, libelling upon the Decreet and Bond of Cautionry above recited, and concluding, that he ought to be decerned in terms of that Decreet, or otherwise, to make Payment to the said Pursuers of the Sum of 100^l. *Sterling*, and of 50^l. *Sterling*, with Annualrent and Penalty. In the Course of that Process, the Lord Justice-Clerk Ordinary, upon the 19th of *February* 1756, " Decerned the " Defender to make Payment to the Pursuers of 150^l. *Ster-*
" *ling*,"



“ *ling*, in Terms of the Libel.” Against which Interlocutor, there having been a Representation offered for the Defender, and Answers made thereto for the Pursuers, his Lordship, upon the 26th of *January* last, “ Before Answer granted “ Warrant for incident Diligence at the Pursuer’s Instance, “ for calling *Robert Grant* to depone upon what was in his “ Hands the Time of the Arrestment; and he having accordingly depone, that he knew not what Effects belonging “ to *Barbara* and *Grizel Grants* were in his Custody at the “ Time of the Arrestment libelled, but was told by them, “ that they had sent to his Warehouse one or two Trunks, “ or other Packages, in order to be shipped for *Aberdeen*, “ and which they said contained their Wearing Apparel; “ but that he never saw these Trunks or Packs, nor knew “ what was sent or contained in them, being taken in and “ given out by his Servant in his Absence.” The Lord Ordinary, upon the 2d of *March* last, “ Made Avisandum “ to the Lords, with the Representation for *David Bruce*, “ and the Answers thereto for *John Macarthur*, and ordained “ Parties Procurators to give in Memorials against the 15th “ of *June* then next.” In Obedience to which Appointment, what follows is humbly submitted to your Lordships on the Part of the Defender.

It was then contended for him in the first Place, That, both by the express Words of the Bond of Cautionry, and in the Nature of the Thing, he could be considered to lie under no Obligation to a higher Extent than the Value of the Goods affected by Arrestment, used in the Hands of *Robert Grant*, when, upon his becoming Cautioner, that Arrestment was loosed. The Words of the Obligation, as above recited, are extremely clear, that the Goods arrested should be made forthcoming, which can import no more, than that if they were not made forthcoming to the Arresters, the Memorialist, as Cautioner in the loosing the Arrestment, should be liable in the Value thereof, without Regard either to the Extent of the
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Sum due to the Creditors Arresters, or to the Extent of the Sum expressed in the Execution to have been arrested; and, as the Words of the Obligation can bear no other Meaning, that Construction is equally agreeable to the Nature of the Thing; for, it appears inconceivable, how an Arrester, after an Arrestment is loosed, can be in any better Situation, than if such Arrestment had not been loosed; in which Case the Action would not lie against the Person, in whose Hands the Arrestment was loosed, either to the Extent of the Debt due to the Arrester, or to the Extent of the particular Sum mentioned in the Execution of Arrestment, but to the Extent of the Goods which should be legally instructed to have been in the Possession of that Person, in whose Hands the Arrestment was used at the Time thereof.

That, so far as the Memorialist has been able to learn, the Nature of Arrestments, and of Cautionries for loosing thereof, has been constantly so explained by your Lordships, ever since that Decision observed by Lord *Durie* upon the 21st of *June* 1626, Lord *Balmerino* contra Laird of *Lochinvar*, where it was found, that *Lochinvar* could not be pursued as Cautioner in the loosing of an Arrestment, till it was tried and found by Sentence, that *Denmill*, in whose Hands the Arrestment was laid, was Debitor to the Laird of *Balfour* in the Sums arrested, in which Case, upon the 2d of *February* thereafter, it was again found, that the Pursuer was restricted to prove, before he could obtain Decreet against the Cautioner, that the Persons, in whose Hands the Arrestments were used, were, at the Time thereof, Debtors to him for whose Debt it was laid on, and that *Lochinvar* could be decerned to pay no more than the Quantity which should be proved to be resting, although more was arrested

It was argued for the Pursuers, “ That, in this Case, the
 “ Subject arrested having been locked Trunks, if these had
 “ remained under Arrestment, they would have had Access to
 “ them in the Condition they were in, whereby it would have

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“ appeared what the Extent of the arrested Goods was, where-
 “ as these Trunks having been delivered up upon the loosing
 “ of the Arrestment, the Pursuer cannot possibly now bring a
 “ Proof of what they contained, wherefore of Necessity the
 “ Defender, who ought, before he became Cautioner in the
 “ loosing of the Arrestment, to have examined into the Kinds-
 “ and Quantities of the Goods arrested, so as to be able to
 “ show the Value of the same, must be liable for the Debt
 “ due to the Arresters.”

To which it was answered, 1st, That even, supposing the
 Defender to have had a Design in loosing of the Arrestment to
 get the Goods delivered to the two Mrs. Grants for whose
 Debt it was used, that they might have the Disposal thereof,
 without its being in the Power of the Arresters to bring a le-
 gal Proof of the Value of the same, otherwise than by the
 Oaths of the Proprietors, yet it does not appear upon what
 Ground in Law the Cautioner, in the loosing of the Arrest-
 ment, can be made liable for the whole Debt: It is admitted,
 that either the Oaths of the Proprietors of the Goods, or of
 the Person in whose Hands the Arrestment was used, will be
 good Evidence of the Value of the Subjects arrested, but with-
 out that, or some other legal Evidence of what the Value of
 the Goods affected by the Arrestment truly was, there seems
 to be no Reason to subject the Cautioner, against whom al-
 though an Action lie to repair the Loss sustained by the Ar-
 resters, through the Arrestment's being loosed, yet that Loss
 must necessarily be ascertained before such Action can have
 Effect.

But 2^{dly}, The Defender absolutely denied he so much as
 knew that the Goods arrested were contained in locked
 Trunks, when he became Cautioner in the loosing of the Ar-
 restment. He was very sensible, that if the Pursuers should
 prevail in their Process, he would be liable to them as far as
 they could legally instruct they had affected their Debtors
 Goods by that Arrestment, and he imagined he was no fur-

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ther liable. It did not occur to him to be any Part of his Concern to make Inventories of the Goods arrested, so as to furnish the Pursuers with Evidence of what their Value was; that he apprehended was the Business of the Arresters themselves; and allowing that he had been somewhat incautious in not examining particularly into the Quantities or Value of those Goods before he became Cautioner in the loosing of the Arrestment, it appeared to be too great a Punishment for such a Rashness to subject him to a Claim of this Sort, whereby he would be made liable to the Debt due to the Pursuers, were it of ever so great an Extent.

Hitherto the Defender has argued upon the Supposal that the Pursuers Arrestment was duly laid on, and the Decreet against Mrs. *Barbara* and *Grizel Grants* regularly obtained; but it was further contended for him, by Way of Objection to the depending Process, whereupon the Arrestment was used, and wherein that Decreet was obtained, that although the Libel be founded upon the Nomination of *John Macarthur*, as Executor of the deceased *Ludowick Grant*, and upon the other Pursuer Mrs. *Elizabeth Leslie* being Creditor to him, yet there appears no Confirmation in the Person of either, or so much as a Licence to pursue, the Consequence whereof seems to be, that as there was no Process regularly depending, no Arrestment upon such Dependence ought to have any Effect. And 2dly, that that Decreet proceeded without any other Evidence than the Acknowledgment of Mrs. *Barbara Grant*, one of the Defenders, her having received certain particular Goods belonging to her deceased Brother, and therefore ought to have no Effect against the Defender, as Cautioner in the loosing of the Arrestment further than to the Extent of the Goods so acknowledged to have been received, any more than it will have against the Persons there decerned against themselves.

In respect whereof, &c.

DAVID GRAEME.

